Filed 6/29/10 SeaWest Asset Mgt. v. So. Cal. Sunbelt Developers CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SEAWEST ASSET MANAGEMENT SERVICES, LLC,

Plaintiff, Cross-defendant and Respondent,

v.

SOUTHERN CALIFORNIA SUNBELT DEVELOPERS, INC.,

Defendant, Cross-complainant and Appellant;

AES SEAWEST INC., et al.,

Cross-defendants and Respondents.

G041435

(Super. Ct. No. 06CC10529)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Ronald L. Bauer, Judge. Affirmed.

Enterprise Counsel Group, David A. Robinson; and Jeffrey Lewis for Defendant, Cross-complainant and Appellant.

Stoel Rives, Howard E. Susman and Seth D. Hilton for Plaintiff, Cross-defendant and Respondent SeaWest Asset Management Services, LLC, and Cross-defendants and Respondents AES SeaWest, Inc. and Martin C. Crotty.

Solomon Ward Seidenwurm & Smith and Tanya M. Schierling for Cross-defendant and Respondent Chandar Power Systems, Inc.

* * *

SeaWest Asset Management Services LLC (SeaWest) sued Southern California Sunbelt Developers, Inc. (Sunbelt) for breach of contract and promissory fraud in failing to pay fees to SeaWest for its operation and maintenance of Sunbelt's wind energy project, plus failing to pay the balance due under a separate job contract to make certain repairs to the project's wind turbines. Sunbelt cross-complained against SeaWest and others, including Chandar Power Systems, Inc. (Chandar), seeking damages for breach of contract, fraud, negligence, breach of fiduciary duty, and conversion. During trial, the court granted motions for nonsuit as to SeaWest's fraud cause of action and Sunbelt's claims for negligence, breach of fiduciary duty, and conversion.

The jury found in favor of SeaWest and Chandar. It awarded SeaWest $471,000 on its breach of contract counts and directed Sunbelt recover nothing on its cross-complaint. The court then awarded costs and attorney fees of nearly $770,000 to SeaWest and over $187,000 to Chandar.

Sunbelt appeals, claiming the trial court erred by granting nonsuit on its breach of fiduciary duty cause of action and that the evidence fails to support the jury's finding SeaWest complied with its contractual obligations. Finding both claims without merit, we affirm the judgment.

FACTS

Sunbelt owned a wind energy project near Palm Springs, California named Edom Hill that consisted of 139 wind turbine generators. The project sold the electricity it produced to Southern California Edison.

Edom Hill's turbines were built in the 1980's by a company named Windmatic. Each turbine included both a large generator, that produced electricity at high wind speeds, plus a small generator designed to produce electricity at low wind speeds. In addition, each turbine contained a yaw system that would allow it to rotate with changes in the wind direction.

Prior to mid-1998, operation and maintenance of the park's turbines was performed by a Sunbelt subsidiary named Sunbelt Energy, Incorporated. That year, Sunbelt entered into a contract entitled "Management, Maintenance and Service Agreement" (bold omitted) with a company named SeaWest-San Gorgonio, Inc. Under it, SeaWest-San Gorgonio agreed to manage and operate Edom Hill for a five-year term in return for payment of a variable monthly fee based on Southern California Edison's monthly statements on the project's energy output.

Among its other duties, SeaWest-San Gorgonio agreed to "[m]onitor the performance of the [p]roject and maintain records with respect thereto," "take such actions as are necessary to maximize the production and efficiency of the [p]roject," plus "[u]se its best efforts consistent with sound business practices to maximize the net operating revenue of the [p]roject," and "maintain the [p]roject," including its turbines, "in the best operating condition possible (normal wear and tear excepted) . . . ." SeaWest-San Gorgonio further agreed the scope of its work included "[p]rovid[ing] labor, tools, supplies, . . . and equipment necessary to perform regularly

scheduled service and maintenance . . . as . . . set forth . . . in [e]xhibits . . . attached" to the contract that covered inspections every four months and annual maintenance.

Paragraph 10 of the contract provided that "[i]n performing its obligations hereunder, [SeaWest-San Gorgonio] shall use diligent efforts consistent with sound business practices and with available financial resources, to maximize revenues generated by the operation of the [p]roject and the [p]roject [wind turbine generators] and to minimize expenses . . . ." SeaWest-San Gorgonio "guarantee[d] 100% operational status for the term of the contract," defined to "mean that all of the 139 [p]roject [wind turbine generators] shall be maintained and repaired during the [t]erm of this [a]greement in accordance with the provisions of this [a]greement."

SeaWest presented evidence that when SeaWest-San Gorgonio assumed control of Edom Hill, the yaw systems on all but one of the turbines had been locked so that the turbine faced the prevailing wind direction. A technician who worked for Sunbelt's subsidiary described "the yaw system on the early turbines" as a "weak link" because "it needed constant repair[]." SeaWest's expert witness testified that since "the energy-producing winds come from the west," the solution developed in the Palm Springs area was to "get rid of the whole yaw system itself by aligning it to the west" and "lock[ing] the turbine . . . ." Another SeaWest employee testified the company had locked the yaw systems on 1980's-era turbines located at other wind parks it owned after conducting a study and concluding it was economically more beneficial to do that than allow the turbines to yaw and service and repair the yaw systems.

SeaWest also presented evidence that the small generators on the 1980's-era turbines produced little power and required frequent maintenance or replacement. Thus, Sunbelt's practice and that of other wind energy parks employing similar equipment had been to disable the small generators and rely only on the large generators to produce electricity. One former Sunbelt technician testified that when SeaWest-San

Gorgonio took over Edom Hill less than half of the turbines had been operating small generators.

In 2003, a third party expressed interest in buying Edom Hill. Dan Baer, Sunbelt's president, authorized a consulting company named Airstreams LLC to inspect the park. Airstreams prepared at least two reports on the park's condition. One report noted "100% of the turbines are disabled . . . into the wind," and that "the vast majority of the site has been locked into the prevailing wind for approximately 5 years or more." Although Airstreams's reports suggested there were several problems with the park's operation, the proposed sale failed for financial reasons.

Thereafter, Sunbelt and Chandar, the "successor-in-interest by merger to SeaWest-San Gorgonio, Inc.," signed an amendment to the Management, Maintenance and Service Agreement to extend the contract for an additional five-year term with an automatic extension for an additional five-year period. Except for certain amendments and additional terms added by the amendment, the parties agreed the original contract "shall remain in full force and effect . . . ."

In part, the amendment provided "Chandar has agreed to assign its interests . . . in the [a]greement to SeaWest and SeaWest has agreed to assume the rights and obligations . . . under the [a]greement." However, while also providing "Chandar . . . delegates and assigns its rights and . . . obligations . . . under the [a]greement and this [a]mendment to SeaWest and SeaWest . . . assume[s] the[se] rights and obligations," the assignment clause declared "Chandar is not released from any liability or obligations under the [a]greement or this [a]mendment."

SeaWest sent Sunbelt monthly reports on the park's operations. The reports contained an operational summary and data reports that reflected meteorological conditions, the park's projected and actual output, information on when and why specific turbines were offline and what repair work was performed, plus a comparison of conditions and output for the park's current and prior years of operation.

In mid-2005, Roger Tuck, a SeaWest employee who had worked at Edom Hill for Sunbelt Energy, Incorporated, contacted Baer and told him SeaWest was not adequately maintaining the park. SeaWest presented evidence that Tuck, who at the time was no longer involved with Edom Hill, took this action because he had recently been demoted due to poor performance evaluations.

Claiming he had heard reports from others criticizing Edom Hill's operations, Baer testified he visited "the park a couple of times" and noted "there weren't as many wind turbines operating as should have been, given the wind conditions . . . ." He then hired Airstreams to inspect the park and prepare a report on its findings.

Airstreams's report contained numerous recommendations to improve the park's performance. At a November 23 meeting between Baer and several SeaWest employees, SeaWest agreed to carry out 17 of the recommendations contained in Airstreams's report. However, SeaWest disagreed with proposals to reactivate the turbines' yaw systems and small generators.

The parties eventually compromised, executing an agreement entitled "job contract" (bold and capitalization omitted), whereby SeaWest agreed to reactivate some of the yaw systems and all of the small generators on Edom Hill's turbines in return for Sunbelt's payment of an additional fee, with one-half of it paid upon acceptance of the agreement and the balance due upon completion of the work.

In March 2006, Sunbelt stopped paying fees to SeaWest under the amended management, maintenance and service agreement. When Sunbelt failed to comply with a demand to cure the default, SeaWest terminated the agreement and filed this action. SeaWest completed its work under the job contract in December. Again, Sunbelt failed to pay the balance due for this contract.

DISCUSSION

1. Breach of Fiduciary Duty

a. Introduction

"The elements of a cause of action for breach of fiduciary duty are: 1) the existence of a fiduciary duty; 2) a breach of the fiduciary duty; and 3) resulting damage. [Citation.]" (*Pellegrini v. Weiss* (2008) 165 Cal.App.4th 515, 524.) As noted, the trial court granted nonsuit on the ground the evidence failed to support the existence of a fiduciary relationship between Sunbelt and either SeaWest or Chandar.

Code of Civil Procedure section 581c, subdivision (a) authorizes a trial court to grant a nonsuit '"where, disregarding conflicting evidence on behalf of the defendant[] and giving to plaintiff's evidence all the value to which it is legally entitled, therein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff.' [Citations.]" (*O'Keefe v. South End Rowing Club* (1966) 64 Cal.2d 729, 733.) "'In determining whether plaintiff's evidence is sufficient, the court may not weigh the evidence or consider the credibility of witnesses.'" (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291.) But "[a] mere 'scintilla of evidence' does not create a conflict for the jury's resolution; 'there must be *substantial evidence* to create the necessary conflict.' [Citation.]" (*Ibid.*)

"Since motions for a nonsuit raise issues of law, the granting of a nonsuit is reviewed de novo on appeal, using the same standard as the trial court. [Citation.]" (*Mejia v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448, 1458.) Thus, "[i]n reviewing a grant of nonsuit, . . . [w]e will not sustain the judgment '"unless interpreting the evidence most favorably to plaintiff's case and most strongly against the defendant and resolving all presumptions, inferences and doubts in favor of the plaintiff a

judgment for the defendant is required as a matter of law."' [Citations.]" (*Nally v. Grace Community Church, supra,* 47 Cal.3d at p. 291.)

b. Analysis

Citing "the degree of control that SeaWest assumed over [Edom Hill]," which Sunbelt claimed "prohibited [it] from interfering with the management of the wind project," plus the purported "assurances that SeaWest gave regarding its ability and willingness to maximize the operation of the wind project for Sunbelt's benefit," Sunbelt claims the trial court erred in dismissing its fiduciary duty claim because "the relationship [between Sunbelt and SeaWest] was fiduciary in nature."

Cases have recognized a fiduciary relationship constitutes """any relation existing between parties to a transaction wherein one of the parties is . . . duty bound to act with the utmost good faith for the benefit of the other party."""" (*Gilman v. Dalby* (2009) 176 Cal.App.4th 606, 613; *Herbert v. Lankershim* (1937) 9 Cal.2d 409, 483.) "Inherent in . . . these relationships is the duty of undivided loyalty the fiduciary owes to its beneficiary, imposing on the fiduciary obligations far more stringent than those required of ordinary contractors." (*Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 30.) But "before a person can be charged with a fiduciary obligation, he must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law. [Citations.]" (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 221, superseded by statute on another point as stated in *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 228.)

Sunbelt argues SeaWest agreed "not . . . mere[ly] . . . to fix broken turbines" but, citing its claimed "'expertise and knowledge in the management, operation, maintenance and service of wind energy projects,'" it "accepted the obligation to

manage . . . Edom Hill . . . for Sunbelt's benefit." (Italics omitted.) Thus, "SeaWest essentially took over the management, maintenance and every single aspect of the daily operations of Sunbelt's wind project leaving Sunbelt with nothing to do but rely on SeaWest's expertise and integrity."

However, the case law requires more than one party's assumption of control over the operation of another party's property, plus the latter's reliance on the former's promise to act in a manner beneficial to the latter. *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375 reversed the portion of a judgment awarding damages for breach of fiduciary duty to the plaintiff medical center for the defendant biotechnology company's failure to pay royalties on its commercial exploitation of secret genetic engineering processes developed by the plaintiff's scientists. Noting "[i]t is not at all unusual for a party to enter into a contract for the very purpose of obtaining the superior knowledge or expertise of the other party," and "that '[e]very contract requires one party to repose an element of trust and confidence in the other to perform'" (*id.* at p. 389), the Supreme Court rejected the plaintiff's claim a "relationship is necessarily fiduciary" where "(1) one party entrusts its affairs, interests or property to another; (2) there is a grant of broad discretion to another, generally because of a disparity in expertise or knowledge; (3) the two parties have an 'asymmetrical access to information,' meaning one party has little ability to monitor the other and must rely on the truth of the other party's representations; and (4) one party is vulnerable and dependent upon the other" (*id.* at pp. 387-388). "[T]he four characteristics articulated . . . are common in many a contractual arrangement, yet do not necessarily give rise to a fiduciary relationship." (*Id.* at p. 388.)

In *Committee on Children's Television, Inc. v. General Foods Corp., supra,* 35 Cal.3d 197, the Supreme Court rejected a claim that, in a commercial context, "imposition of fiduciary obligations is appropriate whenever one party with a stronger

bargaining position or greater knowledge has the ability to reach out and exploit the weaker party." (*Id.* at p. 221, fn. omitted.) Thus, it held "[s]omething more is needed." (*Ibid.*)

The trial court properly found the evidence presented was insufficient to support a finding the parties had a fiduciary relationship. First, the foregoing cases establish Sunbelt's reliance on SeaWest's purported expertise in operating wind parks and its repose of trust in the latter's promises concerning its maintenance of Edom Hill was not sufficient to justify sending the breach of fiduciary cause of action to the jury.

Second, contrary to Sunbelt's claims concerning Baer's lack of knowledge about the management and operation of a wind park, Baer had been actively involved in a variety of business enterprises throughout his career and had participated in maintaining Edom Hill for over a decade before entering into the original management, maintenance, and service agreement with SeaWest-San Gorgonio. Nor does the record support the claim Sunbelt lacked the ability to monitor SeaWest's operation of the park. While SeaWest insisted on performing the servicing and repair duties at Edom Hill, Sunbelt's access to the park was not restricted. Twice during the term of the parties' relationship, Airstreams was given access to Edom Hill to inspect and report on the operational status of the turbines. Baer also claimed his purported concern over SeaWest's management of the park was triggered by visits to the park and his personal conclusion "there weren't as many wind turbines operating as should have been, given the wind conditions . . . ."

Finally, SeaWest did not agree to operate the park solely for Sunbelt's benefit. The parties' contract provided SeaWest would be paid a "monthly fee . . . based on the productivity of the project . . . ." Thus, managing Edom Hill in a manner that would maximize its energy output benefitted SeaWest as well as Sunbelt.

Sunbelt's reliance on *Michelson v. Hamada* (1994) 29 Cal.App.4th 1566 is unavailing. Contrary to Sunbelt's summary of that case, *Michelson* affirmed a

judgment against the defendant for breach of fiduciary duty, concluding the parties' "written agreements disclose an agency relationship" because "Michelson retained the legal right to control the activities of Hamada and the corporation in their role as his agents." (*Id.* at p. 1580.) Case law has long recognized "[f]iduciary duties arise as a matter of law 'in certain technical, legal relationships[,]'" one of which is "principal and agent [citation] . . . ." (*Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 632, fn. omitted.) Sunbelt's description of the parties' legal relationship effectively precludes a finding of an agency relationship. (*Malloy v. Fong* (1951) 37 Cal.2d 356, 370 [Since "[t]he existence of the right of control and supervision establishes the existence of an agency relationship," determining "[w]hether a person performing work for another is an agent . . . depends primarily upon whether the one for whom the work is done has the legal right to control the activities of the alleged agent"].)

For the same reason, Sunbelt's attempt at oral argument to characterize the parties' relationship as either a partnership or joint venture fails. A partnership is defined as "the association of two or more persons to carry on as coowners a business for profit . . . ." (Corp. Code, § 16202, subd. (a).) "[T]he incidents of both [partnerships and joint ventures] are the same in all essential respects," save for the fact "a partnership ordinarily involves a continuing business, whereas a joint venture is usually formed for a specific transaction or a single series of transactions . . . ." (*Bank of California v. Connolly* (1973) 36 Cal.App.3d 350, 364.) "An essential element of a partnership or joint venture is the right of joint participation in the management and control of the business. [Citation.] Absent such right, the mere fact that one party is to receive benefits in consideration of services rendered or for capital contribution does not, as a matter of law, make him a partner or joint venturer. [Citations.]" (*Ibid.*; see *Spier v. Lang* (1935) 4 Cal.2d 711, 716 ["reliance . . . on the provision of the contract that the defendants were to share in a division of the profits . . . has long been held not to require a conclusion that a partnership relation existed where also there was no joint participation in the management and

control of the business"].) A conclusion the parties held the status of partners or joint venturers contradicts Sunbelt's assertion that the extent of SeaWest's control over Edom Hill precluded its participation in the wind project.

Under these circumstances, we conclude the trial court properly granted the motion for nonsuit as to Sunbelt's breach of fiduciary cause of action.

2. Sufficiency of the Evidence

Citing the undisputed facts that the yaw systems and small generators on the turbines at Edom Hill had been disabled and that SeaWest failed to strictly comply with the manufacturer's recommended maintenance schedule for the turbines, Sunbelt also claims the evidence fails to support the jury's verdicts on SeaWest's breach of contract claims.

First, we agree with SeaWest's claim Sunbelt's failure to fully and accurately summarize the evidence presented at trial precludes assertion of this claim. "'It is well established that a reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact.' [Citations.]" (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) An appellant shoulders the "affirmative burden to demonstrate otherwise. [Citations.]" (*Garlock Sealing Technologies, LLC v. NAK Sealing Technologies Corp.* (2007) 148 Cal.App.4th 937, 951.) Consequently, "if[an appellant] . . . contend[s] 'some particular issue of fact is not sustained, [it is] required to set forth in [its] brief *all* the material evidence on the point and *not merely [appellant's] own evidence*. Unless this is done the error assigned is deemed to be waived.' [Citations.]" (*Foreman & Clark Corp. v. Fallon, supra,* 3 Cal.3d at p. 881; see also *Benson v. Kwikset Corp.* (2007) 152 Cal.App.4th 1254, 1273.)

While Sunbelt pays lip service to the substantial evidence rule, its summary of the evidence views the record in the light most favorable to its interpretation of the record, focusing on the testimony supporting its case and either minimizing or ignoring

the contrary evidence. "In every appeal, 'the appellant has the duty to fairly summarize all of the facts in the light most favorable to the judgment. [Citation.]'" (*Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 739.)

Even on the merits, Sunbelt's insufficiency of the evidence argument fails. "In reviewing the sufficiency of the evidence, we must consider all of the evidence in the light most favorable to the prevailing party, accept as true all the evidence and reasonable inferences therefrom that tend to establish the correctness of the trial court's findings and decision, and resolve every conflict in favor of the judgment. [Citation.] 'It is not our task to weigh conflicts and disputes in the evidence; that is the province of the trier of fact. Our authority begins and ends with a determination as to whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted, in support of the judgment.' [Citation.]" (*Baxter Healthcare Corp. v. Denton* (2004) 120 Cal.App.4th 333, 369.)

As for the evidence concerning disabling the turbines' yaw systems and small generators, nothing in the contract prohibited this practice. Generally, "'An appellate court is not bound by a construction of the contract based solely upon the terms of the written instrument without the aid of evidence [citations], where there is no conflict in the evidence [citations], or a determination has been made upon incompetent evidence [citation].' [Citations.]" (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865-866.) But "[i]nterpretation of a written instrument becomes solely a judicial function only when it is based on the words of the instrument alone, when there is no conflict in the extrinsic evidence, or a determination was made based on incompetent evidence. [Citations.]" (*City of Hope National Medical Center v. Genentech, Inc., supra,* 43 Cal.4th at p. 395, fn. omitted.) Thus, if "the intent of the parties at the time the contract was executed depends on the credibility of extrinsic evidence, that credibility determination and the interpretation of the contract are questions of fact that may properly be resolved by the [trier of fact] [citation]." (*Ibid*.)

In the management, maintenance, and service agreements, SeaWest and Chandar promised to "take such actions as are necessary to maximize the production and efficiency of the [p]roject," plus "[u]se [their] best efforts consistent with sound business practices to maximize the net operating revenue of the [p]roject," and "maintain the [p]roject," including its turbines "in the best operating condition possible (normal wear and tear excepted) . . . ." They further agreed to "use diligent efforts consistent with sound business practices and with available financial resources, to maximize revenues generated by the operation of the [p]roject and the [p]roject [wind turbine generators] and to minimize expenses . . . ." At trial, there was testimony that not only was the practice of disabling the yaw systems and small generators common in the Palm Springs area wind energy industry and that Sunbelt had followed the practice before turning over operation and maintenance to SeaWest's predecessor, but also, due to the savings in repair costs and reduction of turbine down time, these steps did not adversely affect the turbines' energy production.

The evidence also supports SeaWest's claim its failure to strictly comply with the manufacturer's recommended maintenance schedule did not constitute a failure to substantially perform its contractual obligations under the management, maintenance, and service agreement. David Schulgen, one of the owners of Airstreams, who testified as an expert for Sunbelt, admitted his company did not strictly comply with the manufacturer's recommended maintenance schedule for similar wind turbine equipment at a project it serviced. He agreed that "[t]urbine maintenance procedures ha[d] evolved somewhat from the eighties when the[] manuals" were prepared.

Thus, we conclude Sunbelt has failed to establish the jury's verdicts on SeaWest's contract claims are unsupported by the evidence. As a consequence of this conclusion, plus the rejection of its attack on the dismissal of the breach of fiduciary duty claim, we further conclude no basis exists to reverse the trial court's attorney fee awards.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

IKOLA, J.